



November 5, 2002

Ms. Elizabeth G. Neally
Roerig, Oliveira & Fisher, L.L.P.
855 West Price Road, Suite 9
Brownsville, Texas 78520-8786

OR2002-6285

Dear Ms. Neally:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171757.

The Brownsville Independent School District (the "district"), which you represent, received two requests for two sets of copies of information gathered pursuant to a specified investigation. You indicate that the district has or will release some responsive information to the requestors. You claim, however, that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.101, 552.102, 552.107, 552.111, 552.114, and 552.131 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the information at issue is subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). The submitted information constitutes a completed investigation under section 552.022(a)(1). Thus, the district must release this information unless it is expressly confidential under other law or is excepted from disclosure under section 552.108 of the Government Code. Although the district claims that portions of the information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code, we

¹ We note that former section 552.131 of the Government Code, "Exception: Certain Information Held by School District," was renumbered as section 552.135 by the Seventy-seventh Legislature, effective September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2812, § 21.001(54) (codified at Gov't Code § 552.135). The revision was non-substantive. Accordingly, we will address your section 552.131 claim under section 552.135 of the Government Code.

note that these exceptions to disclosure are discretionary exceptions under the Public Information Act (the "Act") and, as such, do not constitute "other law" that makes information confidential.² Accordingly, we conclude that the district may not withhold any portion of the information at issue under these exceptions to disclosure. However, since the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence, we will determine whether any portion of the information at issue is confidential under rule 503. Further, since the district also claims that portions of the information at issue are excepted from disclosure under sections 552.101, 552.102, 552.114 and 552.135 of the Government Code, we will address those particular claims with regard to this information.

We note that the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Rule 503(b)(1) of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503.

A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See id.* Therefore, in order for information to be withheld from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Based on our review of your arguments and the information that the district claims to be excepted from disclosure under section 552.107, we conclude that the entirety of this information constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, we conclude that the district may withhold the information that we have marked pursuant to rule 503.

You claim that portions of the remaining information at issue are excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure

under the common-law right to privacy as incorporated by section 552.101. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we address the district's section 552.101 and 552.102 claims together.³ We note that information is protected from disclosure under the common-law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See id.* After carefully reviewing the remaining information at issue, we find that no portion of this information is protected from disclosure under the common-law right to privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, we conclude that the district may not withhold from disclosure any portion of the remaining information at issue under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also claim that portions of the remaining information at issue are subject to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *See id.* § 1232g(a)(4)(A).⁴

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

⁴ In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of

Information must be withheld from disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). This includes information that directly identifies a student, as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments making identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). Based on our review of your arguments and this information, we find that portions of the information, which we have marked, constitute personally identifiable information contained in a student's education records. Accordingly, we conclude that the district must withhold the information that we have marked pursuant to FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978). Because the submitted audiotape also includes such information, we also conclude that the district must withhold this audiotape in its entirety pursuant to FERPA.

However, we note that some of the information that you claim to be protected from disclosure under FERPA may constitute "directory information." FERPA also provides that, "directory information" may be released to the public if the institution or agency complies with section 1232g(a)(5)(B) of title 20 of the United States Code. "Directory information" includes the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. *See* 20 U.S.C. § 1232g(a)(5)(A). Section 1232g(a)(5)(B) provides as follows:

[a]ny educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any

requesting an attorney general decision as to that exception. In this instance, however, the district has submitted the information at issue to this office for consideration. Therefore, we will consider whether any portion of the remaining information at issue is excepted from disclosure under sections 552.026 and 552.114 of the Government Code.

or all of the information designated should not be released without the parent's prior consent.

20 U.S.C. § 1232g(a)(5)(B). We note that this office has previously held that a class roster is directory information. *See* Open Records Decision No. 244 (1980). Here, some of the information at issue is similar to a class roster. Accordingly, if the district has designated the information that we have marked as "directory information" under FERPA as directory information, then the district is required to disclose this information after complying with federal notice requirements for its release. *See id.*; *see also* 34 C.F.R. § 99.37. However, if the district has not designated this information as directory information, then the district must withhold this information pursuant to FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978).

You also claim that portions of the remaining information at issue are excepted from disclosure pursuant to section 552.135 of the Government Code. Section 552.135 provides:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.131. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this exception to disclosure must clearly identify the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). In this case, we find that the district has failed to sufficiently demonstrate that the conduct reported to the district concerns a possible violation of criminal, civil, or regulatory law under section 552.135. Accordingly, we conclude that the district may not withhold any portion of the remaining information at issue under section 552.135 of the Government Code.

We note that portions of the remaining information at issue are subject to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the official or employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Based on our review of the remaining information at issue, we conclude that the district must withhold the information that we have marked under section 552.117(1) of the Government Code, if the current or former employees or officials with whom this information is associated requested confidentiality for this information in accordance with

section 552.024 prior to the district's receipt of the request for information. Otherwise, the district must release this information to the requestors. The information that we have marked constitutes a representative sample of the types of section 552.117(1) information that must be withheld, if the above conditions have been met. We note, however, that Mr. Paz, one of the requestors in this instance, has a special right of access to any information pertaining to him that is excepted from disclosure under section 552.117(1). *See* Gov't Code § 552.023 (person or a person's authorized representative has special right of access to information that relates to person and that is protected from disclosure by laws intended to protect person's privacy interest). Accordingly, we also conclude that the district must release to Mr. Paz all section 552.117(1) information that we have marked pertaining to him.

Nevertheless, we note that the social security numbers of these officials or employees, as well as the social security numbers of students that we have not marked, may still be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). Section 552.101 also encompasses information that is protected from disclosure by other statutes. These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I) and, thus, excepted from disclosure under section 552.101 on the basis of that federal provision. We caution the district, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the district should ensure that they were not obtained or are not maintained by the district pursuant to any provision of law enacted on or after October 1, 1990. Again, we note, however, that the district must release Mr. Paz's social security number to him. *See* Gov't Code § 552.023.

We also note that portions of the remaining information at issue contain e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Accordingly, we conclude that the district must withhold the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code, unless the members of the public in question with whom they are associated have affirmatively consented to their release.

In summary, the district may withhold the information that we have marked pursuant to rule 503 of the Texas Rules of Evidence. The district must withhold the information that we have marked pursuant to FERPA, to include the entirety of the submitted audiotape. The district must release some information that we have marked as "directory information" pursuant to FERPA after complying with federal notice requirements for its release, if the district has designated this information as directory information. The district must withhold the information that we have marked under section 552.117(1) of the Government Code, if the current or former employees or officials with whom this information is associated requested confidentiality for this information in accordance with section 552.024 of the Government Code prior to the district's receipt of the request for information. However, the district must release to Mr. Paz all section 552.117 information that we have marked pertaining to him pursuant to section 552.023 of the Government Code. Social security numbers that are associated with district officials or employees, as well as the social security numbers of students that we have not marked, may nevertheless be confidential under federal law. Again, however, the district must release Mr. Paz's social security number to him under section 552.023. The district must withhold the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code, unless the members of the public in question with whom they are associated have affirmatively consented to their release. The district must release the remaining submitted information to both requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

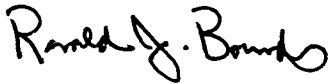
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Ms. Elizabeth G. Neally - Page 11

Sincerely,

A handwritten signature in black ink that reads "Ronald J. Bounds". The signature is written in a cursive style with a large, stylized "R" and "B".

Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 171757

Enc. Marked documents

cc: Reverend Ben Castillo
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